Office-Supreme Court, U.S.
FILED
JAN 19 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 673

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
135 S. LaSalle Street
Chicago 3, Illinois

PETER FITZPATRICK
JOHN B. HEINEMANN
10 S. LaSalle Street
Chicago 3, Illinois
Attorneys for Petitioner Margaret Nugent

Of counsel:
THOMPSON, RAYMOND, MAYER & JENNER
135 S. LaSalle Street
Chicago 3, Illinois

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6581

TABLE OF CONTENTS

	PAGE
Opinion below	2
Jurisdictional statement	2
Questions presented	2
Federal Rules of Civil Procedure involved	5
The facts	6
Reasons for granting the writ:	10
I. The decision of the court below emasculates Rule 60(b) and radically departs from the accepted course of federal judicial proceedings.	10
II. The decision of the court below conflicts with the *Sternstein* case decided by the Second Circuit Court of Appeals, and with other cases.	12
III. The inequity perpetrated here should be solved by enlightened construction of Rule 60(b), and not by amendment to other rules.	14
Conclusion	16
Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit	17
Appendix B—Judgment of the United States Court of Appeals for the Seventh Circuit	22
Appendix C—Rules 6 and 59 of the Federal Rules of Civil Procedure	23

TABLE OF AUTHORITIES

PAGE

Daulton v. Southern Pacific Company, 228 F. 2d 103 (9th Cir. 1955) 13

Hulson v. Atchison, T. & S. F. Ry. Co., 27 F.R.D. 280 (N.D. Ill. 1960), affirmed 289 F. 2d 726 (7th Cir. 1961), cert. denied 82 S. Ct. 61 ..... 10, 15

Klapprott v. U. S., 335 U.S. 601 (1949) 13, 15

Sternstein v. "Italia"-Societa, etc., 275 F. 2d 502 (2d Cir. 1960) 12

Whayne v. Glenn, 114 F. Supp. 784 (W.D. Ky. 1953) revd. on other grounds, 222 F. 2d 549 (6th Cir. 1955) 13

Yanow v. Weyerhaeuser Steamship Co., 274 F. 2d 274 (9th Cir. 1959) cert. denied, 362 U.S. 919 14

In the
Supreme Court of the United States

OCTOBER TERM, 1961

No.

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Margaret Nugent, plaintiff-appellant in the court below, petitions this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the cause *Margaret Nugent v. Yellow Cab Company*, No. 13329, on November 8, 1961, which affirmed the judgment and orders of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 21, 1960, March 7, 1961, and March 14, 1961.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 295 F. 2d 794, is appended hereto as Appendix A (pages 17 to 21). The District Court rendered no opinion in this case.

Jurisdictional Statement

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment and orders of the United States District Court for the Northern District of Illinois, Eastern Division, were filed and entered on November 8, 1961 (R. 2-3*; Appendices A and B hereto, pages 17 to 22.)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit by writ of certiorari under the provisions of 28 U.S.C. Section 1254(1).

Questions Presented

Rule 60(b) of the Federal Rules provides in part that federal courts "may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence . . . or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

---

* "R" refers to the certified transcript of the proceedings in the Court of Appeals filed with this petition. "A" refers to the Appendix to Appellant's brief filed in the Court of Appeals, a copy of which is included in the certified transcript, and nine copies of which have been filed with the Clerk of this Court pursuant to Rule 23(1) of the Rules of this Court.

The questions presented by this petition are:

1. Does the decision of the Court of Appeals, holding that plaintiff's motion for new trial could not be entertained, constitute or sanction such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in view of the following facts:

(a) Plaintiff, after verdict and judgment, presented a written motion to extend the 10-day period established by Rule 59(b) for filing a motion for new trial, to permit the court reporter to complete the preparation of the trial transcript for use by counsel in preparing a motion for new trial.

(b) Defendant's counsel appeared in open court and expressly agreed to the requested enlargement of time.

(c) The trial judge thereupon entered an order extending the time for filing a motion for new trial.

(d) Counsel for plaintiff and the trial judge (and presumably counsel for defendant) inadvertently overlooked the provisions of Rule 6(b) of the Federal Rules providing that the 10-day period for filing motions for new trial may not be extended.

(e) Plaintiff's motion for new trial was filed within the extended time.

(f) After the motion was filed, defendant moved to strike the motion on the technical ground that, although its counsel had agreed to the enlargement of time, the Court was without power to grant the enlargement.

(g) Plaintiff immediately submitted an affidavit of her counsel that they had inadvertently overlooked the

provisions of Rule 6(b), and requested that she be relieved from the judgment by reason of mistake, inadvertence, or excusable neglect, under Rule 60(b).

(h) Defendant was not harmed by the delay in filing the motion for new trial.

(i) If plaintiff's petition for relief under Rule 60(b) is not granted, plaintiff's motion for new trial will have been disposed of on the basis of a technicality and not on the merits.

2. Does the decision of the Court of Appeals, holding that the District Court, having extended the time for filing the motion for new trial, was without power under Rule 60(b) to entertain the motion filed within the extended time, conflict with *Sternstein* v. *"Italia"-Societa, Etc.*, 275 F. 2d 502 (2d Cir. 1960), which holds that, although no extension of time has been ordered, a federal district court has power under Rule 60(b) to entertain a motion for new trial filed after the expiration of the 10-day period?

3. Does Rule 60(b), authorizing relief from final judgments in cases of mistake, inadvertence, excusable neglect or any other reason justifying relief, authorize a federal court to correct the inequity which occurs when a litigant obtains an extension of the 10-day period established by Rule 59(b) for the filing of a motion for new trial, and where the moving party's counsel, the trial judge, and presumably opposing counsel, overlook the provision of Rule 6(b) that the court may not extend the 10-day period established by Rule 59(b)?

4. Where counsel, unaware of the provisions of Rule 6(b) prohibiting extensions of time for serving and filing motions for new trial, moves for an extension of time for serving and filing his client's motion for new trial, and

opposing counsel agrees to the motion, and the district judge grants the motion, is the moving counsel's lack of awareness of Rule 6(b), and his reliance upon the conduct of opposing counsel in agreeing to the order of extension and the conduct of the district judge in entering an order enlarging the time; the kind of "mistake", "inadvertence", "excusable neglect" or "other reason justifying relief" which authorizes relief under Rule 60(b)?

5. Has practice under the Federal Rules of Civil Procedure become so technical and rigid that the courts are powerless to grant equitable relief under Rule 60(b) to consider the merits of a motion for new trial which was served and filed within the time granted by the trial court, and with agreement of opposing counsel, but more than 10 days from judgment, where the trial judge and all counsel overlooked the provision of Rule 6(b) prohibiting enlargement of the 10-day period?

Federal Rules of Civil Procedure Involved

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

Rules 6(b) and 59(b) of the Federal Rules are also involved. They are reproduced in full in Appendix C hereto (page 23).

The Facts

Petitioner Margaret Nugent brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, against respondent Yellow Cab Company to recover damages for injuries sustained by her while she was riding as a passenger in a taxicab owned and operated by defendant. The federal court's jurisdiction was based upon diversity of citizenship of the parties. (28 U.S.C. §1332).

The case was tried before a jury. On April 19, 1961, the jury returned a verdict in favor of Mrs. Nugent in the amount of $12,500. Judgment was entered on the jury's verdict on April 21, 1960. (A. 2.)

On April 28, 1960, within 10 days from the entry of the judgment,* plaintiff's counsel appeared before the trial judge and presented a verified motion for an extension of time within which plaintiff could file her motion for new trial. The extension was requested in order that plaintiff's counsel could have the benefit of the Official Court Reporter's transcript of proceedings, to the end that they could prepare a concise, clear, specific, and complete motion for new trial. (A. 3, 10.)

One of the attorneys for defendant appeared before the trial court when plaintiff's motion was presented on April 28, 1960, and stated to the court that he had no objection to the entry of an order in accordance with plaintiff's request. The trial judge thereupon entered an order extend-

* Rule 59(b) of the Federal Rules of Civil Procedure, which relates to motions for new trial, provides that motions for new trial shall be served not later than 10 days after the entry of the judgment. See Appendix C, below, pages 23 to 24.

ing the time within which plaintiff was permitted to file her motion for new trial to May 31, 1960. (A. 3, 84.)

Thereafter, several additional extensions were granted to plaintiff, for the same reason, and without objection by defendant. The motion for new trial was served and filed September 20, 1960, within the time granted by order of court. (A. 4-6, 84-85.)

On September 26, 1960, defendant presented a motion to strike plaintiff's motion for new trial, on the ground that the court had no jurisdiction to extend the time within which to file a motion for new trial,* and had no jurisdiction to entertain or rule upon a motion for new trial filed after the expiration of 10 days from the date of judgment. (A. 8-9.)

Plaintiff filed an answer to defendant's motion to strike her motion for new trial (A. 9-12), and an alternative petition for relief under Rule 60(b) of the Federal Rules of Civil Procedure (A. 12-14). The petition, which is verified by plaintiff's counsel, states in part the following (A. 13-14):

> 2. In seeking extensions of time within which to file plaintiff's motion for new trial, plaintiff and her counsel did not attempt or intend to prejudice defendant, or to delay the proceedings in this cause. To the contrary, plaintiff and her counsel desired and still desire to have this litigation expedited. Their sole purpose in seeking extensions of time for the filing of the motion for new trial was to have an opportunity to consult the transcript, to the end that they could prepare a clear, concise, complete motion for new trial.

---

* Rule 6(b) of the Federal Rules, a rule relating to enlargement of time in general, provides that the court "may not extend the time for taking any action under rules . . . 59(b) . . ." See Appendix C, below, pages 23 to 24.

No prejudice has resulted or will result to defendant by reason of the extensions of time granted to plaintiff for the filing of her motion for new trial.

3. Plaintiff's counsel, through mistake or inadvertence, overlooked and were not aware of that portion of Rule 6 of the Federal Rules of Civil Procedure which provides that the Court may not extend the time for taking any action under Rule 59(b) except to the extent and under the conditions stated in that Rule. The action of defendant's counsel, in agreeing to plaintiff's original motion for extension of time within which to file her motion for new trial, and in not objecting to plaintiff's subsequent motions for extensions, and the action of the Court in granting said motions, served to confirm the oversight of plaintiff's counsel.

4. The interests of justice require that plaintiff be afforded a hearing and ruling upon the merits of her motion for new trial. Rule 60(b) is a remedial provision, which should be liberally construed to the end that controversies will be determined on their merits, and substantial justice accomplished between the parties. No prejudice will result to defendant if this procedure is adopted, and the ends of justice will be served.

Defendant did not respond to plaintiff's petition.

Briefs were filed by the parties, and the matter was taken under advisement by the trial judge. (A. 9, 14-16.) On March 7, 1961, the trial judge entered an order granting defendant's motion to strike plaintiff's motion for new trial, for the reason that the motion was filed beyond 10 days from the date of judgment as required by Rule 59(b). (A. 16-17.) No order was entered with respect to plaintiff's petition for relief under Rule 60(b).

On March 14, 1961, plaintiff moved to vacate the order of March 7. (A. 17.) The trial judge was out of the country, and the motion was heard by another judge of the same court. After hearing argument of counsel, the judge entered an order denying plaintiff's motion to vacate the order of March 7, and denying plaintiff's petition for relief under Rule 60(b). (A. 17.)

Plaintiff appealed from (i) the judgment entered on the jury verdict on April 21, 1960, (ii) the order entered March 7, 1961 striking plaintiff's motion for new trial, and (iii) the order entered March 14, 1961 denying plaintiff's petition for relief under Rule 60(b). (A. 17.)

The Court of Appeals affirmed the judgment and orders appealed from. (See Appendix A and B, pages 17 to 22 below.)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW EMASCULATES RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND RADICALLY DEPARTS FROM THE ACCEPTED COURSE OF FEDERAL JUDICIAL PROCEEDINGS.

This case does not involve merely an isolated instance of injustice done a particular litigant. The Seventh Circuit Court of Appeals has now established a pattern of decisions (cf. *Hulson* v. *A., T. & S. F. Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961), cert. denied 82 S. Ct. 61) which stultify the remedial purposes of Rule 60(b), and which are in absolute conflict with the holdings of this Court and of other federal courts.

Rule 60(b) provides in pertinent part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . ."

This case has been disposed of, not on the merits, but on the basis of a procedural technicality. Plaintiff's counsel unintentionally and inadvertently failed to comply with a time limitation established by the federal rules.

Plaintiff's counsel did not ignore the 10-day time period established by Rule 59(b); they moved to enlarge the time within the 10 days. The trouble is that nothing in Rule 59(b) suggests that the 10-day period may not be enlarged, and plaintiff's counsel inadvertently overlooked Rule 6(b).

Counsel for the defendant agreed to the requested enlargements of time. Defendant's attorneys were either unaware of Rule 6(b), or else they silently permitted the district court to enter an order which they knew it had no power to enter, and which they later sought to capitalize upon.

Even the experienced district judge forgot the prohibition—tucked away in Rule 6(b)—against extending the time under Rule 59(b).

Neither the Court nor the parties were injured as a result of the orders extending the time.

As soon as defendant's counsel pointed out the defect, plaintiff sought relief under Rule 60(b), asking the district court to relieve plaintiff from the finality of the judgment entered on the jury verdict. The affidavit of plaintiff's attorneys in support of plaintiff's petition (A. 12-14) stands unanswered. That affidavit shows clearly that all that is involved here is a technical trap which plaintiff's counsel fell into through inadvertence, mistake, or—at worst—excusable neglect.

If this situation does not present grounds for relief under Rule 60(b), it is difficult to understand the purpose of those who drafted the rule, and who, to make certain they included every equitable ground for relief, added Subsection (6), which is all-inclusive.

By denying relief in this case, the Court of Appeals for the Seventh Circuit has destroyed the primary purposes of Rule 60(b), namely, to prevent form from overriding substance, to prevent procedural technicalities from controlling the outcome of litigation. This Court, in the exercise of its supervisory powers over the federal courts, should not permit modern federal practice to revert to the kinds of technicalities which were so justly criticized in days gone by, and which make the law appear absurd to the common man.

II.

THE DECISION OF THE COURT BELOW CONFLICTS WITH THE STERNSTEIN CASE DECIDED BY THE SECOND CIRCUIT COURT OF APPEALS.

There is a conflict between the decision of the court below and the decision of the Second Circuit Court of Appeals in *Sternstein* v. *"Italia" Societa, Etc.*, 275 F. 2d 502 (2d Cir. 1960). In the *Sternstein* case, an action for personal injuries resulted in a verdict and judgment for the defendant. More than 10 days after the action was dismissed, plaintiff served and filed a motion for new trial. The trial court first granted the motion, then vacated its order on the ground that the motion was "not timely made." (23 F.R.D. 305, S.D. N.Y. 1959.) On appeal, the Second Circuit Court of Appeals held (275 F. 2d at 503):

> "We need not decide whether it was too late to move for a new trial under Rule 59(b), which contains the ten day limitation. It is clear that a motion for a new trial under Rule 60(b) may be made "within a reasonable time," and the delay here was no more than a few days. The trial judge believed the interests of justice required a new trial and the record discloses that there was a proper basis for such belief. Rule 60(b) was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice. As we find no abuse of such discretion, we vacate the order of April 3, 1959 and reinstate the order of January 20, 1959 granting the new trial. Accordingly, the case is remanded."

In *Sternstein*, relief was granted under Rule 60(b) even though the plaintiff had not obtained an order extending the time for filing the motion for new trial. It follows, *a fortiori*, that relief ought to be granted where the moving

litigant obtained, by agreement, an extension of time for filing the motion.*

The decision of the court below also conflicts with *Daulton* v. *Southern Pacific Company*, 228 F. 2d 103 (5th Cir. 1955).

The decision of the Seventh Circuit Court of Appeals is contrary to decisions of this Court interpreting Rule 60(b). For example, in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949), this Court stated the broad remedial application of Rule 60(b) (335 U.S. at pp. 614-615):

> "... In simple English, the language of the 'other reason' clause [Rule 60(b)(6)], for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

Chief Judge Roy M. Shelbourne, sitting in the District Court of Kentucky, was confronted with a problem almost precisely the same as that in the case at bar, in *Whitmore* v. *Glenn*, 114 F. Supp. 784 (W.D. Ky. 1953), reversed on other grounds 222 F. 2d 549 (6th Cir. 1955). The defendant agreed to the entry of an order extending the time within which plaintiff could serve and file a post-trial motion, and the motion was filed within the extended time. Judge Shelbourne held that he could rule upon the merits of the motion because "defendant should be held to have

---

* In the Respondent's brief in opposition to the petition for certiorari in the *Hulson* case, the only mention of the *Sternstein* case appears at page 12; it is stated that in *Sternstein*, "a motion for a new trial was made within ten days of the Court's findings of fact in a bench trial." This distinction is grounded upon an immaterial fact, since the 10-day period for filing motions for new trial is computed from "the entry of the judgment" under Rule 59(b). It is therefore immaterial that the motion was made within 10 days after the prevailing party filed his findings of fact and conclusions of law. The opinion of the court below cannot be reconciled with the opinion in the *Sternstein* case.

waived the provision of the rules requiring such a motion to be filed within 10 days of the entry of judgment. . . ." (114 F. Supp. at 785.) See also *Yanaw* v. *Weyerhaeuser Steamship Co.*, 274 F. 2d 274 (9th Cir. 1959), cert. denied 362 U.S. 919.

The equitable doctrines of waiver and estoppel apply where counsel agrees to the entry of an order enlarging his opponent's time, and later takes the position that the court had no authority to enlarge the time. Subsection 6 of Rule 60(b) should be interpreted to include these equitable grounds for relief.

III.

THE INEQUITY PERPETRATED HERE SHOULD BE SOLVED BY ENLIGHTENED CONSTRUCTION OF RULE 60(b), NOT BY AMENDMENT TO OTHER RULES.

The court below mistakenly blamed the Federal Rules for the inequity which occurred in this case and in the *Hulson* case (289 F. 2d 726, cert. denied 82 S. Ct. 61).

The Seventh Circuit Court of Appeals suggested that plaintiff's request for the relief should be directed to the "study groups" now considering revisions to the Federal Rules. No matter what these committees may devise to prevent in the future the injustice worked in the instant case, they cannot foresee all the instances which will arise in which intervention of "mistake, inadvertence . . . excusable neglect . . . or other reason justifying relief . . ." may create a situation which will put a district judge in the unhappy position of having to enforce a technicality, whose non-observance harmed no one, rather than to decide an issue on its merits.

No one can draft a fair set of rules of procedure which does not include a rule, or imply a practice, permitting the court to grant relief when a literal application of the rules would work injustice. It is precisely for this reason that the original drafting committee included Rule 60(b) in the Federal Rules of Civil Procedure. Rule 60(b) is the safety valve which authorizes federal courts to prevent harmless procedural aberrations from controlling the outcome of litigation.

Therefore, the blame for the injustice done here and in the *Hulson* case cannot be shifted to the Federal Rules. The trouble lies with the failure of the Seventh Circuit Court of Appeals to construe the rules in the way the framers intended.

There is something pathetic in the protest of a federal district judge that he would do justice if he could, but that the Federal Rules of Civil Procedure forbid it. (See *Hulson v. A. T. & S. F. Ry. Co.*, 27 F.R.D. 280, 284 (N.D. Ill. 1960).) How preferable it is to follow the interpretation of Rule 60(b) made by this Court in *Klapprott* v. *U.S.*, 335 U.S. 601, and by the other federal courts, referred to above at pages 12 to 14.

The Federal Rules of Civil Procedure, no matter how evolved, no matter how conscientiously and how often revised, will not work justice unless this Court, in the exercise of its duty to supervise the federal courts, continually sees to it that the Rules are not inflexibly and blindly enforced without regard to the equities of the situation. Rule 60(b) is now a dead letter in the Seventh Circuit. It is up to this Court to breathe life back into that rule, and to make it clear that Rule 60(b) should be given the intelligent interpretation and application its framers intended.

Conclusion

Petitioner respectfully asks this Court to issue its writ of certiorari to the Court of Appeals for the Seventh Circuit to review the judgment in this case, and thereafter to remand this case to the district court with directions to grant plaintiff's petition under Rule 60(b) and to consider plaintiff's motion for new trial on the merits.

Respectfully submitted,

ALBERT E. JENNER, JR.
PETER FITZPATRICK
JOHN B. HEINEMANN
THOMAS P. SULLIVAN
Attorneys for petitioner Margaret Nugent

Of counsel:
THOMPSON, RAYMOND, MAYER & JENNER
135 S. LaSalle Street
Chicago 3, Illinois

January 22, 1962

APPENDIX A

Opinion of the United States Court Appeals for the Seventh Circuit

November 8, 1961

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is a diversity action brought by plaintiff Margaret Nugent (appellant) to recover damages for injuries sustained by her on March 19, 1958 while she was riding as a passenger in a taxicab owned and operated by defendant Yellow Cab Company (appellee).

Following a trial by jury, a verdict was returned finding the issues in favor of plaintiff and assessing her damages at $12,500. Judgment on the verdict was entered April 21, 1960.

On April 28, 1960, plaintiff moved the trial court to extend the time for the filing of a motion for new trial to May 31, 1960. One of defendant's attorneys was present in court and stated that he had no objection to plaintiff's request and the motion was granted.

On May 31, 1960, plaintiff filed a second motion for an extension of time to file her motion for new trial and the motion was granted, without objection.

On June 14, 1960 and July 14, 1960, plaintiff's third and fourth motions for similar extensions of time to file her motion for a new trial were granted, without objection.

The latter extension was to and including September 20, 1960.

The reason assigned for each of the four extensions of time was that the official court reporter had not yet prepared the trial transcript.

On September 20, 1960, plaintiff filed her fifth motion for an extension of time for the filing of a motion for new trial to which defendant objected in open court. Thereupon, on the same date and within the time previously allowed by the trial court, plaintiff filed her post-trial motions for judgment notwithstanding the verdict and for a new trial.

Thereafter, defendant moved to strike plaintiff's post-trial motions on the ground that they were not filed within 10 days after the verdict was received and judgment entered thereon as required by Rules 50(b)[1] and 59(b), (d) and (e)[2] of the Federal Rules of Civil Procedure, 28 U.S.C.A., and on the further ground that the trial court was without authority to extend the time for taking action.

---

[1] Rule 50(b). "* * * Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. * * *"

[2] Rule 59(b). "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

Rule 59(d). "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

Rule 59(e). "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

under Rule 59(b) because of the prohibition set out in Rule 6(b).[3]

Plaintiff then filed her answer to defendant's motion to strike her post-trial motions and an alternative petition for relief under Rule 60(b).[4]

The ground asserted by plaintiff in her alternative petition for relief under Rule 60(b) was that:

> "3. *Plaintiff's counsel*, through mistake or inadvertence, *overlooked and were not aware of that portion of Rule 6* of the Federal Rules of Civil Procedure which provides that the Court may not extend the time for taking any action under Rule 59(b) except to the extent and under the conditions stated in that Rule. * * * *" (Emphasis added.)

The trial court held that it was without authority to rule on plaintiff's post-trial motions because they were not filed within the 10 days required by Rules 50(b) and 59(b), (d) and (e), and granted defendant's motion to strike. Subsequently, the trial court denied plaintiff's alternative petition for relief under Rule 60(b).

No ruling was made on the merits of plaintiff's motion for a new trial which complains of the inadequacy of the award of damages.

---

[3] Rule 6(b). "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged * * * or (2) * * * permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules * * * 50(b), * * * 59(b), (d) and (e), * * * except to the extent and under the conditions stated in them."

[4] Rule 60(b). "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, suprise or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Plaintiff has appealed from the judgment entered on the jury verdict, from the order striking her motion for a new trial and from the order denying her alternative petition for relief under Rule 60(b).

Plaintiff's counsel, with commendable candor, concede that our recent holding in *Hulson* v. *Atchison, T. & S. F. Ry. Co.*, 7 Cir., 1961, 289 F. 2d 726, certiorari denied, October 9, 1961, 82 S. Ct. 61, is dispositive of this appeal. They contend, however, that our holding in *Hulson* is incorrect and argue for a reversal of it.

On the facts, the procedural situation in *Hulson* is almost identical with the case at bar. There we considered at some length the rules under scrutiny here and the authorities bearing upon them. In *Hulson*, we expressly held:

(1) That Rule 50(b) forbids the entry of a judgment n.o.v. on a motion not filed within 10 days after reception of the verdict.

(2) That Rule 59(b), (d) and (e) prohibits a trial court from granting a motion for a new trial made after the expiration of 10 days after entry of judgment.

(3) That, with certain exceptions having no application there, the 10-day period for filing a motion for new trial under Rule 59(b) cannot be enlarged by the trial court under Rule 6(b).

(4) That opposing counsel cannot waive the strict requirements of the rules fixing the time for filing post trial motions by agreeing to such extensions of time.

(5) That, under the facts before us, ignorance of the rules resulting in an agreement for an unauthorized extension of time for filing post-trial motions does not furnish grounds for relief under Rule 60(b).

We have given careful consideration to plaintiff's contentions but feel compelled to adhere to our holding in *Hulson, supra*, for the reasons and under the authorities therein set out. These need not be restated here. They require an affirmance of the case now before us.

If the rules applicable to the case at bar are too strict or bring about an undesirably harsh result, they should be revised or amended as provided by law and not through the judicial process. We express no opinion here on the desirability of such changes. However, we do point out that the Federal Rules of Civil Procedure are now under study by appropriate committees, and counsel have an opportunity to present their views to such study groups.

The judgment and orders of the district court appealed from are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, November 8, 1961

BEFORE

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

MARGARET NUGENT,
Plaintiff-Appellant,

No. 13329 vs.

YELLOW CAB COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

Federal Rules of Civil Procedure.

RULE 6.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, eff. March 19, 1948.

RULE 59.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits; which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.

Office-Supreme Court, U.S.
FILED
MAR 7 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 673

MARGARET NUGENT, *Petitioner,*

vs.

YELLOW CAB COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALBERT M. HOWARD
One North La Salle Street
Chicago 2, Illinois
Attorney for Respondent,
Yellow Cab Company

CHARLES D. SNEWIND
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Questions Presented	1
The Facts	2
Federal Rules of Civil Procedure Involved	2
Reasons for Denying the Writ	3
Conclusion	17
Appendix	1a

Authorities Cited.

Brest v. Philadelphia Transportation Co., 273 F. 2d 22 (3rd Cir. 1959)	6
Cleveland v. U. S., 329 U.S. 14	15
Daulton v. Southern Pacific Co., 228 F. 2d 103 (9th Cir. 1955)	14
F. D. I. C. v. Alker, 234 F. 2d 113, 116 (3rd Cir. 1956)	5
Fine v. Paramount Pictures, 181 F. 2d 300 (7th Cir. 1950)	4, 6
F. T. C. v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 211 (1952)	5
Hulson v. A. T. and S. F. Ry. Co., 289 F. 2d 726 (7th Cir. 1961)	3, 6
John E. Smith & Sons Co. v. Lattimer Foundry, 239 F. 2d 815 (3rd Cir. 1955)	8, 12
Johnson v. New York, N.H. & H.R. Co., 344 U.S. 48 (1952)	4
Martin v. Hess, 146 F. 2d 360 (6th Cir. 1949)	12
Orange Theatre Corp. v. Rayherstz Amusement Corp. (CCA 3rd, 1942), 130 F. 2d 185, 6 F.R. Serv. 6b.12	10

PAGE

Slater v. Peyser, 200 F. 2d 360 (D.C. Cir. 1952) 11

Sternstein v. "Italia" Societa, 275 F. 2d 503 (2d Cir. 1950) 12

Steward v. Atlantic Refining Co., 235 F. 2d 570 (3rd Cir. 1956) 4, 6

United States v. Mayer, 235 U.S. 55 (1914) 12

United States v. Robinson, 361 U.S. 220, 229 (1960) 15

Wayne v. Glenn, 114 F. Supp. 784 14

STATUTES CITED.

Federal Rules of Civil Procedure, R. 60(b), 73(a), 6(b), 50(b), (d), (e) 1a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 673

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Can the policy of Federal procedure as expressed in Rules 59 and 6(b) which sets a definite time within which a motion for a new trial may be served and filed, be emasculated to relieve a litigant of his failure to observe these mandatory time limitations?

2. Where it is admitted that the post trial motion was not made in compliance with the time limitations of the Federal Rules of Civil Procedure, can this jurisdictional defect be cured by a motion under Rule 60(b) which merely alleges that counsel was not aware of Rules?

3. Should certiorari be granted to review the decision of the Court of Appeals that "ignorance of the rules resulting in an unauthorized extension of time can-

not serve to furnish grounds for relief under Rule 60(b), under the facts in this appeal"?

4. Should this Court grant certiorari to review a policy issue inherent in the Federal Rules of Civil Procedure or leave such a determination to the rule-making process?

THE FACTS.

Petitioner's Statement of Facts is substantially correct. However, it is not that the Petitioner fails to state that after the first request for an extension was granted, the Petitioner made and the trial court allowed numerous requests for further extensions for an enlargement of time in which to file her motion for a new trial and that the motion for a new trial was not "served" until more than five months after the entry of the judgment.

While it is true that one of the attorneys for the Respondent appeared before the trial court when the Petitioner's first motion for an extension was presented on April 28, 1960, and stated to the Court that he had no objection to the particular enlargement requested, the respondent did not consent to the further extensions requested by the Petitioner.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

As indicated in petitioners' brief, (Rules 60(b), 59(b) and 6(b) of the Federal Rules of Civil Procedure are involved. In addition, however, respondent submits that Rules 50(b), 50(d), (e) and 73(a) are also involved and are reproduced in the Appendix herein.

REASONS FOR DENYING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN ACCORDANCE WITH THE ESTABLISHED RULE THAT RELIEF CANNOT BE GRANTED UNDER RULE 60(b), MERELY BECAUSE THE PETITIONER WAS IGNORANT OF THE RULES.

This case cannot be distinguished in point of law from the recent decision in the case of *Hulson* v. *A.T. & S.F. Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961), Certiorari denied, 82 S. Ct. 61. The principal factual difference between the *Hulson* case and the case at bar lies in the fact that in the *Hulson* case only one request for an order enlarging the time for filing a motion for a new trial was made, while in the case at bar repeated motions were made to this effect and the motion for a new trial was not "served" until more than five months after the entry of the judgment.

In the *Hulson* case the judgment of "not guilty" was entered on June 7th, 1960. On June 17th an order was entered on motion of the plaintiffs enlarging the time for the filing of a motion for judgment notwithstanding the verdict or in the alternative for a new trial for a period of ten days. Thereafter, within the 10 day extension the plaintiffs filed their motion for judgment notwithstanding the verdict and for a new trial and served copies of the same upon the attorney for the defendant.

On July 15, 1960 the defendant filed a motion to strike plaintiffs' post trial motions for the reasons that the same were not filed within the time limits prescribed

by Rule 59(b), (d) and (e), and that the court was prohibited from enlarging the time in which to serve such a motion by reason of the provisions of Rule 6(b). As, in the case at bar the plaintiffs sought relief under Rule 60(b).

Subsequently, the trial court in a written memorandum sustained defendant's motion to strike plaintiffs' post trial motions on the grounds that plaintiffs' motions were not made within the ten days after the reception of the verdict, and under Rule 59(b), the trial court was prohibited from considering such motions and also that the trial court was without jurisdiction to enlarge the time within which to file such motions under the provisions of Rule 6(b) and that Rule 60(b) was inapplicable. The Court cited the case of *Johnson* v. *New York, N.H. and H. Ry. Co.*, 354 U.S. 58, (1952); *Mickey* v. *Tremco Mfg. Co.*, (7th Cir.) 226 F. 2d 956; *Dugo* v. *Penn. Ry. Co.*, 125 F. Supp. 934; *Stewart* v. *Atlantic Refining Co.*, 235 F. 2d 570; *Fine* v. *Paramount Pictures*, 181 F. 2d 300.

The Court of Appeals accordingly held that Rule 6(b) prohibited any enlargement of the time limitations prescribed in Rules 50(b), 59(b) and 73(a). A basic principle of Federal Civil Procedure was thereby correctly decided in compliance with decisions of this Court. (*Johnson* v. *New York, N.H. & H. R. Co.*, 344 U.S. 48 (1952); *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), and *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). In the *Johnson* case a verdict was returned for the plaintiff and judgment entered. Within ten days after reception of the verdict, defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the pre-verdict motion for dismissal and

for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

> "On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212. We repeated that construction of the rule in *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, and reemphasized it in *Fountain* v. *Filson*, 336 U.S. 681."

In *F. T. C.* v. *Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, at page 211 this Court commented on the policy consideration dictating a strict enforcement of the time limitations on review and at page 213 of the opinion said:

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review."

The Circuit Courts of Appeal have followed the decisions of this Court in holding that the time limitation for post-trial motions and the appeal period are jurisdictional in nature and cannot be extended. *Fine* v. *Paramount Pictures,* 181 F. (2d) 300 (7th Cir. 1950); *Waddell* v. *Chicago Land Clearance Comm.,* 206 F. (2d) 748 (7th Cir. 1953); *Raughley* v. *Penn. R. R. Co.,* 230 F. (2d) 387 (3rd Cir., 1956); *Brest* v. *Philadelphia Transp. Co.,* 273 F. (2d) 22 (3rd Cir. 1959); *Knowles* v. *U. S.,* 260 F. (2d) 852 (5th Cir., 1958); *Steward* v. *Atlantic Refining Co.,* 235 F. (2d) 570 (3rd Cir. 1956); *Virginia Land Company* v. *Miami Ship Corp.,* 201 F. (2d) 506 (5th Cir. 1953); *Randolph* v. *Randolph,* 198 F. (2d) 956 (D. C. Cir., 1952); *Deena Produce Co.* v. *United Brick and Clay Workers,* 195 F. (2d) 612 (6th Cir., 1952), cert. denied 344 U.S. 822; *Jusino* v. *Morales and Tio,* 139 F. (2d) 946 (1st Cir. 1944).

Petitioner is not entitled to relief under Rule 60(b) as this rule cannot be used to excuse a failure to file a motion for a new trial within the time required by Rules 59(b), 6(b) merely because Plaintiff overlooked these provisions.

Plaintiff's motion for relief under Section 60(b) of the Federal Rules of Civil Procedure is predicated upon the allegation that plaintiff's counsel, through a mistake and inadvertence, overlooked and was not aware of that portion of Rule (6) of the Federal Rules of Civil Procedure which provided that a court may not extend the time for the taking of any action under Rule 59(b), except to the extent that under the conditions stated in that Rule." (A. 13).

In the case of *Hulson* v. *A. T. & S. F. Ry. Co.,* 289 F. 2d 726, as in the case at bar, the only ground of relief

suggested by counsel for the appellants to invoke Rule 60(b) was that "through inadvertence and mistake" they overlooked the provisions of Rule 6(b). On this issue the *Hulson* case cannot be distinguished from the case at bar, either in fact or in point of law. In fact the attorneys for the plaintiff in the instant case appeared as *amicus curiae*, and filed a petition for a rehearing in the *Hulson* case. They sought and obtained leave to appear in the *Hulson* case upon the allegation made at that time that the decision in the *Hulson* case was decisive of the issues raised in the instant case.

As has been noted, Rule 6 (b) provides that a court may not extend the time for taking any action under Rules 50(b), 59(b), (d) and (e), "except to the extent and under the conditions stated in them." These rules contain no conditions here applicable and for this reason the time provisions have been held to be jurisdictional.

Rule 60(b) makes express reference to Rule 59(b) in subparagraph (2) and provides for relief from a final judgment where there has been "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." No reference is made anywhere else in Rule 60(b) to Rule 59(b). The fact that express reference is made to Rule 59(b) indicates that Rule 60(b) was not intended to apply to extend the time limitations of Rule 50(b) or 59(b) except under the very narrow circumstances outlined in 60(b) (2) dealing with newly found evidence. If all of the sub-sections of 60(b) had been intended to supplement the post-trial motion procedure of Rules 50(b) and 59(b), there would have been no purpose in specifying a single ground of newly found evidence, for relief from a judgment after the ten-day period has elapsed.

The only ground relied on by counsel for petitioners to invoke Rule 60(b) in their motion before the Trial Court was that through inadvertence and mistake they overlooked the provisions of Rule 6(b).

It is apparent that if petitioners prevail on this theory, this provision of 6(b) would be emasculated. If petitioners' contention is sustained every litigant who failed to comply with the provisions of these rules could then circumvent them by the mere assertion that he was unaware of or overlooked the rule. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

In *John E. Smith & Sons Co.* v. *Lattimer Foundry*, 239 F. (2d) 815 (3rd Cir. 1955), the opinion of the trial court contains a comprehensive analysis of Rule 60(b), 19 F.R.D. 379 (M.D. Pa. 1956). A motion for a new trial which had been filed but not served within ten days was stricken pursuant to Rule 59(b). The court stated at 19 F.R.D. 381:

> "The provision of Rule 59(b) requiring that a motion for a new trial be served not later than ten days after entry of judgment is mandatory. Cf. *Greenwood* v. *Greenwood*, 3 Cir., 1955, 224 F. 2d 318, 319. Rule 6(b) prohibits any enlargement of the time. Cf. *Leishman* v. *Associated Wholesale Electric Co.*, 1942, 318 U.S. 203, at page 206, 63 S.Ct. 543, 87 L. Ed. 714; *Safeway Stores, Inc.* v. *Coe*, 1943, 78 U. S. App. D.C. 19, 136 F.2d 771, at page 775, 148 A.L.R.

782. 'We think that the purpose of Rule 6(b) which forbids the court to enlarge the time for taking any action under Rule 59 was to divest the court of jurisdiction to entertain a motion * * * filed out of time.' *Raughley* v. *Pennsylvania R. Co.*, 3 Cir., 1956, 230 F. 2d 387, at page 390. * * * 6(b) renders a court powerless to entertain such motions when untimely made' and where the court acts contrary to such mandate its action 'must * * * be considered as a nullity.' *Id.* Merely filing is 'not enough. cf. *Steward* v. *Atlantic Refining Co.*, 3 Cir., 225 F.2d 570."

There the defendant, however, moved for relief under Rule 60 (b) and the court in treating this motion stated at pages 383 and 384:

"Since there are no allegations in the motion or petition seeking relief under Rule 60(b), see and cf. note 5, *supra*, we can only assume that defendant's counsel rely upon mistake, inadvertence, or excusable neglect. * * * Vol. 10, Cyc. of Federal Procedure, Ch. 37, sec. 37.01, p. 292, states, "No one has ever fathomed the exact significance of the phrasing. 'Mistake' is rarely an excuse in the law and is generally frowned upon; 'surprise' is scarcely ground for a continuance, unless well justified; 'inadvertence' means unpreparedness, which is certainly no excuse in earlier stages of a lawsuit; and 'excusable neglect' is a self nullifying term, because that which is adequately excusable is not neglect."'

"Mr. Justice Frankfurter in *Klapprott* v. *United States*, *supra*, 335 U.S. at 630, 69 S.Ct. at pages 397, 398, suggests that 'neglect' in the context carries the idea of negligence and not merely non-action.

"Ordinarily to obtain relief one must be free from negligence. *Simonds* v. *Norwich Union Indemnity Co.*, 8 Cir., 1934, 73 F. 2d 412, at page 415; *Continental National Bank* v. *Holland Banking Co.*, 8

Cir. 1933, 66 F. 2d 823 at page 829; *Knox County* v. *Harshman*, 1890, 133 U.S. 152 at page 154, 10 S. Ct. 257, 3 L.Ed. 586, 'Relief is denied from error resulting from gross carelessness.' 7 Moore op. cit. *supra*, p. 233, citing *Greenspahn* v. *Joseph E. Seagram & Sons, Inc.*, 2 Cir. 1951, 186 F. 2d 616, at p. 619, 'gross carelessness'; 5 Williston on Contracts, Rev. Ed. sec. 1427, p. 3997; *Fischer* v. *Dover Steamship Co., Inc.*, 2 Cir. 1955, 218 F. 2d 682, 683.

"Mr. Justice Minton in *Ackerman* v. *United States*, *supra*, 340 U.S. at page 198, 71 S.Ct. at page 211, speaking for the court states that there 'must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.' See *Kahle* v. *Amtorg Trading Corp.*, D. C. N. J., 13 F.R. D. 107; *In re Riedner*, D.C. E. D. Wis, 94 F. Supp. 289; *Ledwitch* v. *Storkan*, D.C.D. Neb., 2 F. R. D. 539; *Baron* v. *Leo Feist, Inc.*, 2 Cir., 1949, 173 F. 2d 288, 290. See and cf. cases, *supra*, note 8 and see 7 Moore, op. cit. *supra*, sec. 60,10(7), pp. 17 to 21, discussing possible relief under the California decisions, '* * * defaults would not be set aside where dates for filing pleadings were confused by counsel' pp. 19-20. '* * * If relief were afforded in the present case, it would render the prohibition of Rule 6(b) meaningless. A party is not relieved from the duty to take legal steps to protect his interests.' 3 Barron and Holtzoff, Federal Practice and Procedure, Pocket Part, sec. 1329. 'Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity.' 7 Moore, op. cit. *supra*, p. 224.

"In view of the foregoing, we were in error in not granting plaintiff's motion to strike the motion for a new trial."

In *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 130 F. (2d) 185, 187 (3rd Cir. 1942), the court in discussing the power of counsel to extend by stipulation the time provisions of the federal rules, stated:

"However, in addition to implications and technical rules of construction, there exists a sound policy for denying litigants the privilege of enlarging time for pleading by mere stipulation. The guiding mandate of the Federal Rules is that 'They shall be construed to secure the just, speedy and inexpensive determination of every action.' As previously noted, the express provisions in the Rules allowing stipulations aim at this goal. But, if the practice followed by the parties in this case were permitted, the purpose of the Rules would be departed from. Litigants could, as they have done in the past, materially prolong the time for the trial of a case to suit their convenience and interests. The courtesies extended by counsel in such instances, although commendable as professional comity cannot be permitted to interfere with what we think the Rules require."

This case was cited, with approval by Moore in his treatise on Federal Practice (2nd Ed. 1954), who stated at Par. 59.09(1), page 3847, footnote 28:

"Rule 6(b) clearly prohibits court enlargement of the time period in the interest of judgment finality and in preventing an undue extension of the time for appeal. Pars. 6.01(5), 16) 6.07, *supra*. It is not justifiable to allow the parties, without any court supervision, to thwart that policy, when they cannot, even with court leave, do so. And, except as provided in Rule 59(c), see P. 59.10, *infra*, the parties may not extend the time to perform acts under the Rules by a mere stipulation. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, (C.C. A. 3rd, 1942), 130 F. (2d) 185, 6 F.R. Serv. 6b.12, Case 1 (see Par. 6.08, *supra*)."

In *Slater* v. *Peyser*, 200 F. (2d) 360 (D.C. Cir. 1952), the court stated at page 361:

"Counsel's stipulation of December 18 was not intended to extend the 10-day time limit fixed by

Rule 59(b) for filing a motion for rehearing or for a new trial. Moreover, it could not do so. 'An agreement with opposing counsel • • • is not an acceptable reason for failure to comply with the rules of court or, specifically, for failure to move in proper time for extensions of time as provided in such rules.' *Citizens' Protective League, Inc.* v. *Clark*, 85 U.S. App. D. C. 283, 284, 178 F. (2d) 703, 704."

Other decisions to the same effect are:

John E. Smith's Sons Co. v. *Lattimer Foundry and Mach. Co.*, 19 F. R. D. 379 (D.C. Pa. 1956). Aff'd 239 F. (2d) 815 (3rd Cir. 1956).
United States v. *Mayer*, 235 U.S. 55 (1914).

An analogy may also be drawn to the time period within which an appeal may be taken. It is uniformly held that such period is jurisdictional and may not be extended or waived by the parties. *Martin* v. *Hess*, 146 F. (2d) 360 (6th Cir. 1949).

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE STERNSTEIN CASE OR ANY OTHER CASE OF ANY COURT OF APPEALS.

The Petitioner boldly asserts that the decision of Second Circuit Court of Appeals in *Sternstein* v. *"Italia" Societa, etc.*, 275 F.2d 502, is in conflict with the decision of the Seventh Circuit in the *Hulson* case and in the instant case. Their position is untenable under the facts in the *Sternstein* case. This was a case tried by a court without a jury. Rule 52(b) requires that a motion to amend findings must be made ten days after the entry of the judgment *or the making of additional findings.*

The motion was made within the ten days after the "Findings were filed of record." This satisfied the rule. These facts are a far cry from the facts in the case at bar where the question involves jurisdiction of the Court to enlarge the time for the filing of a motion for a new trial.

In the case at bar by a series of motions the time was extended for a period of more than five months while in the *"Sternstein"* case it was at best a matter of a few days after the order of dismissal was entered, but within ten days after the Findings of Fact was filed. It is further noted that it would be impossible to file a comprehensive motion to amend the judgment under Rule 52(b) where the Findings of Facts were not of record.

Rule 6(b) by its terms is made applicable only to final judgments, orders, and proceedings. In this case plaintiff seeks relief from its failure to file a motion for a new trial within the time allowed by Rule 59(b). She is not seeking relief from a final judgment or order. The word "proceeding" must not be construed to enlarge the facts specifically described. *Cleveland* v. *U. S.*, 329 U.S. 14.

There is no claim here that the original judgment entered on the verdict was entered through mistake, inadvertence, surprise or excusable negligence. The only order involved here is the order attempting to enlarge the time in which the plaintiff might file her motion. If the court did not have jurisdiction to enter the order in the first instance, it is clear that Rule 60 does not provide such authority, and any reasonable construction of Rule 60 must be premised on the entry of a judgment order or proceedings in which the trial court had jurisdiction.

It is apparent that if appellants prevail on this theory, the provisions of 6(b) would be emasculated. Obviously, every litigant who failed to comply with the provisions of these rules could then circumvent them by the naked assertion that he was unaware of or overlooked them. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

The case of *Whayne* v. *Glenn*, 114 F. Supp. 784, relied upon by the Petitioner (Plaintiff) is not in point. In a careful reading of the facts in that case disclose than an extension of time in which the Petitioner (Plaintiff) could move for a reargument was stipulated to by the parties. The Court considered this a waiver. It is further noted that in the instant case all of the extensions except the first one were without consent of the Respondent and the first enlargement was not by stipulation.

Similarly the case of *Daulton* v. *Southern Pacific Company*, 228 F. 2d 103 (9th Cir. 1955), cited by the Petitioner (Plaintiff) is not applicable upon its facts to the case at bar. In that case the Court dismissed the motion for a new trial on its merits and the question of relief under Rule 60(b) was not an issue.

III.

THE POLICY QUESTIONS OF LIMITATIONS SHOULD BE RESOLVED THROUGH THE RULE MAKING PROCESSES RATHER THAN BY JUDICIAL DECISIONS.

The Petitioner argues that the *"Inequity Perpetrated"* should be remedied by judicial construction rather than by amendments to the Rules. The *"Inequity Perpetrated"* in the case at bar is predicated upon the assumption that she received less for her disputed injuries than she had anticipated. She requests this Court to construe her failure to file a motion for a new trial for more than five months after the entry of the judgment as *"excusable"* because she failed to ascertain the time limit expressed in the rule for the filing of her motion for a new trial.

The case of *United States* v. *Robinson*, 361 U.S. 220 (1960), demonstrates the fallacy of Petitioner's Argument on this issue.

The *Robinson* case dealt with the appeal period prescribed by Rules 37(a) (2) and 45(b) of Federal Criminal Procedure. Rule 37(a) (2) provides a ten-day period for filing a notice of appeal following a judgment in a criminal case. Rule 45 (b) is similar to Civil Procedure Rule 6(b) in that it prohibits the enlargement of the time limitations on post trial motions and the appeal period. This Court held that by virtue of Rule 45(b) the ten-day appeal period of Rule 37(a) (2) could not be enlarged. In the *Robinson* case, as in the instant case, "excusable neglect" was urged as a ground for relaxing the provisions of these Rules. This Court rejected this ground as a basis for circumventing the Rules and drew a direct analogy to Civil Procedure Rule 6(b) at pages 228 and 229:

"But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. When the original Criminal Rules were being prepared, the limiting clause of Rules 6(b) of the Federal Rules of Civil Procedure stated: '* * * but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.' It has consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45(b)."

This Court then concluded by noting that the jurisdictional nature of these Rules should not be altered by judicial decision. It stated at pages 229 and 230:

"That powerful policy arguments may be made both for and against flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unneces-

sarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it."

CONCLUSION.

It is respectfully submitted that certiorari in the case should be denied because the decision of the Court below followed decisions of this Court in enforcing basic provisions of the Federal Rules of Civil Procedure. The essence of petitioner's compalint is that he did not follow the Rules because he did not read them. Compelling policy considerations of federal procedure demanding a fixed point of time denoting an end to fitigation necessarily prevailed in this situation. Certiorari should not be granted to review the policy issue drafted into these Rules but should be left to the rule-making process.

Respectfully submitted,

ALBERT M. HOWARD,
Attorney for Respondent.

CHARLES D. SNEWIND,
Of Counsel.

APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE CITED.

Rule 50.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might

have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 73.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed: The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

Office-Supreme Court, U.S.
FILED
MAR 13 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 673

MARGARET NUGENT,

Petitioner,

vs.

YELLOW CAB COMPANY,

Respondent.

PETITIONER'S REPLY.

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
135 S. LaSalle Street
Chicago 3, Illinois

PETER FITZPATRICK
JOHN B. HEINEMANN
10 S. LaSalle Street
Chicago 3, Illinois
Attorneys for Petitioner Margaret Nugent

Of counsel:
THOMPSON, RAYMOND, MAYER & JENNER
135 S. LaSalle Street
Chicago 3, Illinois

UNITED STATES LAW PRINTING CO., CHICAGO 10, ILL., LA review 5-6581

In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 673

MARGARET NUGENT, *Petitioner,*

vs.

YELLOW CAB COMPANY, *Respondent.*

PETITIONER'S REPLY.

I.

The cases relied upon by defendant are not in point.

There are two crucial differences between the case at bar and almost every case cited and relied upon by defendant at pages 4 to 6 and 10 to 12 of its brief:

First. In none of those cases except *Hulson* was an order entered by the trial judge extending the time within which a motion for new trial could be filed; and

Second. In all but three of those cases, no request was made for relief under Rule 60(b) when the trial judge and counsel learned that Rule 6(b) prohibits extensions of time for filing motions for new trial.

By misstating plaintiff's position, defendant has erected and demolished a straw man. Plaintiff does *not* contend that the trial court has authority to extend the time for filing a motion for new trial; that issue has been settled by the cases defendant cites at page 6 of its brief. Nor does plaintiff argue that counsel, by stipulation, may confer jurisdiction on the trial court to enlarge the time. Cases such as those cited by defendant at pages 10 to 12 correctly hold to the contrary.

What plaintiff *does* contend is that under the circumstances of this case, the trial judge had power to grant plaintiff's petition for relief under Rule 60(b), and the Court of Appeals erred in holding that such power did not exist.

This case is important in the over-all context of the administration of justice in federal courts because the Court of Appeals for the Seventh Circuit has placed so grudging and narrow a construction on Rule 60(b) as to render it a dead letter. This is especially egregious in light of the fact that Rule 60(b) was adopted in order to afford courts a means to their noblest end—the accomplishment of justice between the parties. This case is also important because the construction placed on Rule 60(b) by the Seventh Circuit Court of Appeals is in conflict with the ruling of the Second Circuit in the *Sternstein* case, which we discuss below at pages 4 to 5.

Only three of the cases cited by defendant involved Rule 60(b). The first is the *Hulson* case, which preceded this case in the Seventh Circuit Court of Appeals, and which is discussed in our opening brief at pages 10, 14 and 15.

In *John E. Smith's Sons Co.* v. *Lattimer Foundry & Machine Co.*, 19 F.R.D. 379 (M.D. Pa. 1956) (Br. pp. 8, 10), the defendant filed but did not serve its motion for

new trial within 10 days after entry of judgment. No order was entered extending the time for service of the motion. When plaintiff moved to strike the motion, defendant's counsel orally requested relief under Rule 60(b), but did not state any facts to explain the delay. The trial court held that the motion under Rule 60(b) was inadequate (19 F.R.D. at 383-384), but that, in any event, the motion for new trial was without merit. (19 F.R.D. at 384-391.)

In *Brest* v. *Philadelphia Transportation Co.*, 24 F.R.D. 47 (E.D. Pa. 1959), opinion on appeal 273 F. 2d 22 (3rd Cir. 1959) (Br. p. 6), plaintiffs served and filed motions for new trial within 10 days after judgment, and several weeks later served and filed additional grounds for the motion. No order had been entered extending the time for filing additional grounds. When defendant questioned the timeliness of the additional grounds, plaintiffs requested relief under Rule 60(b). The District Judge said, ". . . under appropriate circumstances this Court may entertain under Rule 60(b) a motion for new trial which is untimely under Rule 59(b) . . ." But the court held no showing for relief was made because the additional grounds for new trial were without merit; the motions for new trial were denied.

The *Smith* and *Brest* cases do not announce a broad rule against relief under Rule 60(b), as claimed by defendant. To the extent they are relevant, they support plaintiff's position, because they recognize (contrary to the holding of the court below) that, under appropriate circumstances, relief may be granted under Rule 60(b) to one who has filed a motion for new trial out-of-time. But factually these cases are not helpful as precedents here.

The case at bar involves an unintentional, inadvertent, harmless, and we think understandable, oversight of the prohibition tucked away in Rule 6(b). Plaintiff's counsel, defendant's counsel, and the trial judge, all were unaware that the time for filing a motion for new trial may not be enlarged. It is precisely in situations such as this that remedial Rule 60(b) applies, and it is important, we submit, that this Court so announce.

II.

The decision below and the Sternstein case are in direct conflict.

Defendant seeks to reconcile the *Sternstein* decision by making the extraordinary assertion that "Rule 52(b) requires that a motion to amend findings must be made ten days after the entry of the judgment *or the making of additional findings.*" (Br. p. 12; italics defendant's.)

Here is what Rule 52(b) says:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. . . ."

It is clear that defendant is wrong—Rule 52(b) permits motions to amend only within 10 days from entry of judgment, just as Rule 59(b) permits motions for new trial only within 10 days from entry of judgment. There is no provision in Rule 52(b) for motions to amend within 10 days after the court makes "additional findings."

In *Sternstein*, the plaintiff's motion for new trial was filed after the 10-day period. Thus, the District Judge said (23 F.R.D. at 306):

> "If judgment had been entered on December 29, 1958 the motion for a new trial would have been timely. If the entry of judgment was on December 22,

1958, the motion was not timely. Under all the facts in the case and the entries in the civil docket, the Court reluctantly comes to the conclusion that the date of entry of judgment was December 22, 1958. While the Court, as heretofore stated, was ready to grant a new trial, its jurisdiction to do so was limited by the delay of counsel for the plaintiff in making application for a new trial. The application was made too late for the Court to have authority to grant a new trial."

This is the order which the Second Circuit Court of Appeals reversed on the ground that Rule 60(b) "was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice." (275 F. 2d at 503.) This broad and salutary application of Rule 60(b) is consistent with its framers intent, but is completely at odds with the holding of the Seventh Circuit Court of Appeals in this case and in the *Hulson* case.

There is a direct conflict between the Second and Seventh Circuits on this subject. And the Ninth Circuit decided *Daulton* v. *So. Pacific Co.*, 228 F. 2d 103 (9th Cir. 1955), cert. denied 352 U.S. 1005, in which a motion for new trial was served and filed more than 10 days after entry of judgment, without an extension of time, and the trial court and Court of Appeals held that relief should be granted under Rule 60(b).

This Court should grant certiorari to reconcile these conflicting decisions on the construction and application of Rule 60(b).

III.

Rule 60(b) is not limited to motions for new trial on the ground of newly discovered evidence.

At page 7 of its brief, defendant introduces a brand new interpretation of Rule 60(b) never before raised in this case (or any other case of which we are aware). The argu-

ment is that since subsection (a) of Rule 60(b) expressly refers to newly discovered evidence and motions for new trial under Rule 59(b), the drafters intended inferentially to exclude all of the other grounds for relief found in the other subsections of Rule 60(b).

We know of no case which adopts the construction defendant urges. Many cases have held to the contrary, some of which are cited in defendant's brief on other points.

This Court's opinion in *Klapprott* v. *U.S.*, 335 U.S. 601 (1949) is also to the contrary; there it was said that Rule 60(b) empowers courts "to vacate judgments whenever such action is appropriate to accomplish justice." (335 U.S. at 614-615.)

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
135 S. La Salle Street
Chicago 3, Illinois

PETER FITZPATRICK
JOHN B. HEINEMANN
10 S. La Salle Street
Chicago 3, Illinois
Attorneys for Petitioner
Margaret Nugent

Of counsel:
THOMPSON, RAYMOND, MAYER & JENNER
135 S. La Salle Street
Chicago 3, Illinois